IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

ITANAGAR BENCH.

1. **WP(C) NO. 223 (AP) 2012**
2. **WP(C) NO. 107 (AP) 2013**

In WP(C) No. 223 (AP) 2012

1. Sri Shailendra Kumar Sarawgi,
Son of Shri Anandilal Sarawgi, resident of
NeelkanthApartment, A.K. Azad Road,
Rebabari,Guwahati-781008.

2. Dr. Kamal Nahata, Son of Shri Mangilal Nahata,
Resident of fifth floor, Neelkanth Apartment,A.K. Azad
Road, Rebabari,Guwahati-781008.

……**Petitioners.**

By Advocates:
Mr. Diganta Das, Sr. Counsel
Assisted by Mr. D. Panging,

-Versus-

1. The Union of India, represented by the
Secretary, Ministry of Civil Aviation,
Government of India,
New Delhi.

2. The Director General of Civil Aviation,
New Delhi, India.

3. The State of Arunachal Pradesh, represented by the
Secretary, Ministry of Civil Aviation, Itanagar, Govt. of
Arunachal Pradesh.

4. The Pawan Hans Helicopters Ltd. (A Government of India Enterprise), Pawan Hans Towers, C-14, Sector-1, Noida-201301, (Uttar Pradesh).

5. The Company Secretary, Pawan Hans Helicopters Ltd. (A Government of India Enterprise), Pawan Hans Towers, C-14, Sector-1, Noida- 201301, (Uttar Pradesh).

…..**Respondents.**

<u>By Advocates</u>:
Mr. K. Ete, Addl. AG for Resp. No.3.
Mr. M. Pertin, CGC for Resp. Nos. 1 & 2.
Mr. S. Shyam, assisted by Mr. N. Ratan,
ror Resp. Nos. 4 & 5.

<u>With</u>

<u>In WP(C) No. 107 (AP) 2013</u>

1. Smti Sunita Tomden, W/o Late Nawang Tomden, PO & PS- Tawang District, Tawang, Arunachal Pradesh.

2. Master Tsering Tomden (minor) Age about 5 years, S/o Late Nawang Tomden (Represented by his mother Smti Sunita Tomden), PO & PS-Tawang District, Arunachal Pradesh.

3. Master Chodup Tomden (Minor), aged about 1 year old, S/o Late Nawang Tomden, (represented by his mother Smti Sunita Tomden), PO & PS-Tawang District, Arunachal Pradesh.

4. Shri Sangey Choikong, F/o Late Nawang Tomden, Aged about 60 years, PO & PS-Tawang District, Arunachal Pradesh.

5. Smti Nima Chotten, M/o Late Nawang Tomden, aged About 55 years, PO & PS-Tawang District, Arunachal Pradesh.

6. Shri Tomrin Tsering, Brother of Late Nawang Tomden, PO & PS-Tawang District, Arunachal Pradesh.

......**Petitioners.**

By Advocates:
Mr. T. Tagum,

-Versus-

1. The Union of India, represented by the Secretary, Ministry of Civil Aviation, Government of India, New Delhi.

2. The Director General of Civil Aviation, New Delhi, India.

3. The State of Arunachal Pradesh, represented by the Secretary, Ministry of Civil Aviation, Govt. of Arunachal Pradesh, Itanagar.

4. The Pawan Hans Helicopters Ltd. (A Government of India Enterprise), represented by Chairman-cum-Managing Director, Pawan Hans Towers, C-14, Sector-1, Noida- 201301, (Uttar Pradesh).

5. The Company Secretary, Pawan Hans Helicopters Ltd. (A Government of India Enterprise), Pawan Hans Towers, C-14, Sector-1, Noida- 201301, (Uttar Pradesh).

.....**Respondents.**

By Advocates:
Mr. K. Ete, Addl. AG for Resp. No.3.
Mr. M. Pertin, CGC for Resp. Nos. 1 & 2.
Mr. S. Shyam, assisted by Mr. N. Ratan, for Resp. Nos. 4 & 5.

BEFORE
THE HON'BLE DR. (MRS.) JUSTICE INDIRA SHAH
Dated of hearing : 27-11-2013
Date of Judgment and order : 13-03-2014

JUDGMENT & ORDER (CAV)

The petitioners herein are kith and kin of the deceased Lt. Dr. Nawang Tomden, Lt. Wrishi Bothra and Lt. Amit Sarawgi. The deceased persons along with 19 other

people including 4 Crew members were on their journey to Tawang, Arunachal Pradesh on a chopper belonging to Pawan Hans Helicopter Ltd., which departed from Lokopriya Gopinath Bordoloi International Airport at Guwahati and crashed at its intended landing pad at Ugweny Sangpo helipad, Tawang on 19.04.2011 killing 19 of the 23 passengers. The Government of India, Ministry of Civil Aviation appointed a committee of enquiry to investigate into the tragic accident. The committee, after a thorough enquiry, was of the opinion that all the agencies, involved in operating many of the helicopters, were responsible for the death of 19 passangers of the helicopter. It is contended by the petitioners that the enquiry report confirms that there was negligence on the part of the Director General of Civil Aviation (respondent No.2), the State of Arunachal Pradesh (respondent No. 3) and Pawan Hans Helicopter Ltd. (respondent No.4) and for which all the above three (3) are liable to pay compensation at a higher rate than what is described by the notification, dated 28.01.1998, issued by the Ministry of Civil Aviation, Government of India.

2]. The carrier, Pawan Hans Helicopter Ltd., offered a compensation of Rs.7,50,000/- (Rupees Seven lakh fifty thousand only) each to the victims of air crashed, which according to petitioners is not enough. The State of Arunachal Pradesh, respondent No.3, in their affidavit-in-opposition, have admitted the shortcomings, raised in respect of the State of Arunachal Pradesh. The respondent Nos. 4 and 5 have questioned the maintainability of the writ petitions. That apart, the respondent Nos. 4 and 5 have contended that the payments of compensation in this case is governed by the statutory provisions contained in the Carriage by the Air Act, 1972 (‘Act’ in short) and the rules under first and second schedules. According to them, the liability of respondents to pay compensation would be

exclusively governed by the provisions of the aforesaid act. Further, a large number of legal heirs of the deceased passengers have accepted the compensation of Rs. 7,50,000/- (Rupees seven lakh fifty thousand only) as full and final settlement of their claims.

3]. Heard Mr. Diganta Das, learned senior counsel, assisted by Mr. D. Panging for the petitioners in WP(C) 223 (AP)/2012 and Mr. T. Tagum for petitioners in WP(C) 107 (AP)/2013. Also heard Mr. M. Pertin, learned CGC appearing on behalf of respondent Nos. 1 and 2, Mr. K. Ette, learned Additional Advocate General, A.P. for respondent No.3 and Mr. S. Shyam, assisted by Mr. N. Ratan, learned counsel appearing on behalf of the respondent Nos. 4 and 5 in both the writ petitions.

4]. It is submitted by Mr. S. Shyam, learned counsel for respondent Nos. 4 and 5 that in absence of special contract between the parties within the meaning of Rule 22(1) of the second schedule, the liability of carrier is strictly limited to only such amount as indicated in Rule 22(1). Even if the petitioners can prove that they are entitled to claim damages in addition to the statutory liability, as per section 5 of the Act read with Rules 28 and 29 of the second schedule, only a civil suit would lie before the appropriate Court having jurisdiction. The enquiry report submitted by the committee of enquiry into the cause of accident is not substantive piece of evidence. The contents of writ petitions are rebuttable in nature and would give rise to several disputed questions of fact which cannot be looked into by this Court in a writ proceeding.

5]. For proper adjudication of the case in hand, it is appropriate to “relevant provisions of Carriage and Air Act, 1972” as follows:

> ***"Rule 22(1): In the carriage of persons, the liability of the carrier for each passenger is limited to the sum of 2,50,000 francs where, in accordance with law of the court seized of the case, damages may be awarded in the form of periodical payments. The equivalent capital value of the said payments shall not exceed 2,50,000 francs. Nevertheless, by special contract, the carrier and the passengers may agree to a higher limit of liability."***

> ***"Rule 23(1): Any provisions, tending to relief the carrier of liability or to fix a lower limit than that which is laid down in this rule, shall be nullified, by the nullity of any such provisions, does not involve the nullity of whole contract, which shall remain subject to the provisions of these rules."***

> ***"Rule 25: The limits of liability, specified in Rule 22, shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intend to cause damage or recklessly or with knowledge that the damage would probably result, provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of which employment."***

6]. From a conjoint reading of the aforesaid three (3) provisions, it transpires that initially the liability of the carrier, for each passenger, is limited to the sum of 2,50,000 francs. It is submitted by the learned counsel for the petitioners that if 2,50,000 francs is converted in the present currency, exchange rate would quantify to Rs.1,45,00,000/- and as such the notification, limiting the liability to Rs. 7,50,000/- dehors to Rule 23(1), which lays down that any provision, which tends to fix a lower limit than what is prescribed in the rules, shall be nullified.

7]. Rule 25 further provides that the limitation prescribed by rule 22 would not apply if it is comprehensibly proved that the damage resulted from an act or omission of the carrier, his servants or agents and/or an act of recklessness/negligence. The compensation regarding statutory figure of Rs. 7,50,000/-, as prescribed by the notification, would be applied in case of accident governed under the scope of 22(1) of the second schedule of the Carriage by Air Act, 1972. But the same limit extinguishes in case of accident under the category of section 25 of the Act wherein negligence or recklessness can be proved.

8]. The learned counsel for the petitioners has taken me to the conclusion drawn by the enquiry committee and its report of accident to the Pawan Hans Helicopter Ltd., MI-172 helicopter, VT PHF at Tawang in Arunachal Pradesh on 19.04.2011. The conclusion drawn by the committee is as under:

> ***"3. CONCLUSION***
>
> ***1.1 Findings.***
>
> ***3.1.1. The Captain, the Co-Pilot, the Flight Engineer and the Cabin Attendant were all duly authorized to undertake the flight. The Captain and the Flight Engineer were flying under Rule 160 and the Co-Pilot held a CHPL. The Cabin Crew had due approval to fly as Cabin Attendant.***
>
> ***3.1.2. The crew was not subjected to pre-flight medical examination. However, based on the information supplied by the Captain and the Flight Engineer, there was no evidence indicating any adverse medical condition with the flight crew.***
>
> ***3.1.3 The flight crew had adequate rest prior to the flight.***

3.1.4 Mi-172 VT-PHF had a current Certificate of Airworthiness. The helicopter had come out of a major inspection schedule just two days prior to the accident.

3.1.5 No evidence to indicate any malfunctioning of the engine or airframe or any other helicopter system. All helicopter systems were operating normally till the accident.

3.1.6 As indicated by the DFDR, the helicopter was fully serviceable throughout the flight till the actual accident. This is confirmed from the crew as well as from the CVR recordings.

3.1.7 Whether, navigational and landing aids and communication failure were not the cause of the accident.

3.1.8 There was no evidence of a bird hit on the helicopter.

3.1.9 There was no evidence to indicate any sabotage to have caused the accident.

3.1.10 There was no evidence of any pre-impact failure or in-flight fire.

3.1.11 The CRM in the cockpit was adequate and was not a cause for the accident.

3.1.12 This was a survivable accident. However, people died mainly due to inadequate fire services and non-availability of crash equipment and trained personnel.

3.1.13 The helicopter had been making routine flights from Guwahati to Tawang for more than two years. In all this period, the operator violated Indian Aircraft Rules, 1937, Rule 78(4) which states that operators

should not knowingly operate to aerodromes without proper fire fighting facilities.

3.1.14 The Captain was at the controls during landing at the time of accident.

3.1.15 The Co-Pilot had cautioned the Captain to check the height on roll out to finals.

3.1.16 The helicopter was above the specified AUW for that elevation and temperature as per the SOP & Flight Manual.

3.1.17 The helicopter almost came to a hover but with slight forward speed and a very low rate of descent just before the helipad. It impacted the vertical face of the helipad. This resulted in damage to undercarriages. The left oleo leg sheared off leading to a slight toll to the left. At the same time, the Captain had reacted by raising the collective to a very high value resulting in a dynamic roll over.

3.1.18 Aircrews were not using the QNH and temperature readings given by Tango (Tawang) Control.

3.1.19 There was inadequate oversight over flying operations at PHHL. Many flight safety violations had gone unchecked and unreported.

3.1.20 Senior management positions in respect of pilots were not being filled for long period of time, leading to this inadequate oversight at PHHL.

3.1.21 The maintenance and servicing records at PHHL were inadequate and suspect.

3.1.22 PHHL had agreed to certain clauses in contracts with the Govt. of AP, which it was not in a position to fulfill.

3.1.23 The DGCA, as an organization is not able to fulfill its task, because their manpower is extremely inadequate. This has a direct bearing on safety and commercial flying activities in the country.

3.1.24 Arunachal Pradesh Aviation Department is not adequately equipped to man the helipads safely.

3.2 Causes of Accident.

3.2.1 Direct Causes

The accident was caused because the helicopter undershot the helipad by about 27 meters and sunk below the height of the helipad by about a meter. The forward movement and the slow rate of descent caused the left oleo leg to shear off. This gave a slight left bank to the helicopter. Around this time the collective was increased to 13.8^0 in order to increase the rotor thrust. The slight bank and the increase in the rotor thrust increased the angular momentum of the helicopter to such an extent that the bank increased from 5^0 to 85^0 in a second. The rotor hit the beginning of the helipad causing the rotors to break. There being a steep slope adjacent to the helipad, the helicopter slid on this slope and almost turned over on its back after the accident. Subsequently, it caught fire and was totally destroyed.

3.2.2 Contributory Factors to the Accident.

Inadequate use of Met resources had contributed to the accident. Aircrew had disregarded the local QNH and temperature given by Tawang Control.

The AUW was above the stipulated limit given in the Flight Manual for Category 'A' operations."

9]. It is contended by the learned counsel for the petitioners that from the conclusion of the enquiry committee, it can be easily construed that accident was sheer case of contributory negligence for which the provision of Rule 25 shall apply.

10]. Mr. Shyam, learned counsel appearing on behalf of the respondent Nos. 4 and 5 has submitted that since there was no special contract between the parties within the meaning of Rule 22(1) of the second schedule and therefore, the liability of the carrier is strictly limited to only such amount as indicated in the aforesaid rule. Rule 25 is a provision for lifting of liability in Rule 22 and to attract the provisions of Rule 25, it must be proved that the damage resulted from an act or omission of the carrier, his servants or agents done intended to cause damage or recklessly and with knowledge that the damage would probably result intent and knowledge of causing damage requires a proper proceeding in Civil Court. The report of the commission is merely an opinion which is rebuttable. Moreover, the report, if scrutinized carefully, is self-contradictory.

11]. It is, further, submitted that as per the powers conferred by sub section 2 of Section 8 of the Carriage by Air Act, 1972, the Central Government is empowered to make necessary amendment in the Act and accordingly, vide notification, dated 28.01.1998, the Central Government made the amendments in the Act.

12]. Per contra, the learned counsels for the petitioners have submitted that it would not be prudent to envisage the situation wherein in every case of tortious liability, recourse must be had to be a civil suit and not within the ambit of public law or remedy under Article 226. Whether there is negligence on the face of it and when there is infringement of

article 21 then it cannot be said that there will be any bar to proceed under article 226 of the Constitution of India, as the right to live is one of the basic human rights guaranteed under article 21 of the Constitution. Furthermore, the findings of enquiry committee have remained unchallenged till date. The same leaves no room for doubt that ill-fated helicopter crash was an act or omission undisputedly owing to human error and negligence.

13]. Learned counsel for the Respondents has referred the case of **Bharat S. Modi Vs. British Airways, 2002 CPJ 120** and **Indian Airlines Vs. DP Hazra,** wherein it was held that the passengers shall be covered by the Carriage by Air Act and shall be entitled to the compensation as provided in the Carriage by Air Act. The actual damages payable had to be claimed and proved by the injured or the legal heirs of a person died in air crash in a civil court if no settlement was possible. It is further submitted that nowhere in the enquiry report it has been held that the direct cause of accident of the ill-fated chopper was on account of any particular act of negligence of the operator or its employees with reckless disregard to the safety norms which is the direct cause of accident and death of the passengers.

14]. It is urged that there was no act of deliberate omission or commission on the part of the respondent Nos. 4 and 5 that can be linked to the cause of accident. The observations made in the domestic enquiry report are merely opinion of the expert which are prima facie in nature and do not construe undisputed findings of fact as regards the exact cause of accident.

15]. In the cited case of ***Khedarbala Nath Vs. Assam Electricity Board and Another (2008) 4 GLT 116***, this Court has discussed the public law remedy contained in article 226 and held that compensation for a tortuous act

would be available, in the domain of “public law remedy under Article 226, if the cause of action arisen out of tortuous act, is proved to have been committed by an employee of the State either of discharge of his duties or under the colorable exercise of his duties. In the cited case, it has been observed that if a writ petition involves disputed questions of fact and determination of such a dispute requires making of roving enquiry, remedy, under Article 226, would not, ordinarily, be available to the person who claims to be aggrieved. When disputed questions of fact arise and there is clear denial of any tortious liability, the public law remedy, as envisaged by Article 226 of Constitution, may not be proper, but this will not mean that in every case of tortious liability, recourse must be had to assure and not to a writ petition, for when the negligence is apparent, there would be no bar to the invoking of jurisdiction under Article 226.

16]. In the case of ***Tokkong Tayng and Another Vs. State of Arunachal Pradesh and Others***, reported in ***(2009) 5 GLT 242***, the meaning of negligence has been discussed in para 14 of the judgment as follows:

> ***“ Negligence in common parlance means and implies “failure to exercise due care, expected of a reasonable prudent person.” It is a breach of duty and negligence in law ranging from inadvertence to shameful disregard of the safety of other. In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act. Negligence is thus a breach of duty or lack of proper care in doing something, in short, it is want of attention and doing of something which a prudent and a reasonable man would not do (vide Black’s Law Dictionary). Though sometimes the word “inadvertence” stands and is used as a synonym to negligence, but in effect***

negligence represents a state of the mind which, however, is much serious in nature than mere inadvertence. There is thus existing a differentiation between the two expressions _ whereas inadvertence is a milder form of negligence, "negligence" by itself means and implies a state of mind where there is no regard for duty or the supposed care and attention which one ought to bestow."

17]. In the case of ***Rudul Shah Vs. State of Bihar and Another***, reported in ***(1983) 4 SCC 141***, in para 9 and 10, it has been observed as under:

"9. It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of Courts civil and criminal. A money claim has therefore to eh agitated in and adjudicated upon in a suit instituted in a court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of it jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases. The petitioner was detained illegally in the prison for over14 years after his acquittal in a full-dressed trial. He filed a habeas corpus petition in this Court for his release from illegal detention. He obtained that relief, or finding being that his detention in the prison after his acquittal was wholly unjustified. He contends that he is entitled to be compensated for his illegal detention and that we ought to pass an appropriate order for the payment of compensation in this habeas corpus petition itself.

10. We cannot resist this argument. We see no effective answer to it save the stale and sterile objection that the petitioner may, if so advised filed a suit to recover

damages from the State Government. Happily, the State's counsel has not raised that objection. The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention a decree for damages would have to be passed in that suit though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of released from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct it violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringement of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilization is not to perish in this country as it has perished in some others too well-known to suffer mention it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

18]. The concept of public law remedy and civil action for damages under private law was discussed in the case of ***Sube Singh Vs. State of Haryana and Others,*** reported in ***(2006) 3 SCC 178,*** in para 35, is as under:

> ***"The public law proceedings serve a different purpose than the private law proceeding. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by the [the Supreme] Court or indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the rights of the citizen. The payment of compensation in such cases is not to under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort through a suit instituted in a court of compensation jurisdiction or/and prosecute the offender under the penal law. (SCC pp.768-69 para 34)"***

19]. In ***Keher Singh and Others Vs. State (Delhi Administration),*** reported in ***(1988) 3 SCC 609***, the similar

question about admissibility of the report under commission of enquiry Act was discussed and it was observed as under:

> ***"The report is a recommendation of the commission for consideration of the government. It is opinion of the commission based on the statements of witnesses and other materials. It has no evidentiary value in the trial of the criminal case."***

20]. In these writ petitions, the State has accepted that no helipad in the State was licensed. Some safety services in the form of firefighting equipments were provided at the helipads but the operators did not identify/report any shortcomings of safety services. They also admitted that the State Government's Civil Aviation department as well as the Pawan Hans Helicopter Ltd. did not have trial landing report of the helipad. It has also been accepted that fire tender facility was not available at Tawang helipad. In fact, fire service station was still to be established at Tawang district headquarters for which fire tender could not be kept at the helipad for such eventuality. Admittedly, there was no navigational aid installed at the Tawang helipad.

21]. There is no denial of the findings of enquiry commission that the helipad was manned by two personal from the Government of Arunachal Pradesh and five (5) casual workers. One of the government personnel was responsible for ticketing, loading/unloading of passengers. The other was in-charge of the helipad and safety equipment. Both of them were not trained on crash and rescue services. The casual labourers employed, were locally trained to operate the fire extinguishers. There was no crash rescue equipment available at the helipad. The portable fire extinguishers, which were available at the helipad, were ineffective and the fire tender reached the site after about half an hour of the air crash.

22]. The enquiry report also says that Pawan Hans Helicopters Ltd. (PHHL) was under staffed. The DGM (OPS), Northern Region, was also officiating at GM (OPS). The post of GM (OPS) was lying vacant. It was also noticed that for air safety, a post of DGM exists but no one was appointed. A Senior Manager was officiating as the DGM. The post of Executive Director was lying vacant. The GM (Engg.) was officiating as E.D.

23]. In their affidavit-in-opposition of respondent Nos. 4 and 5, it has been averred that Pawan Hans Helicopters Ltd. was adequately staffed. It was officiating GM (OPS), controlling the entire helicopter operations. No post of GM (OPS) was lying vacant. The air safety issues were also looked after by officiating GM with Senior Manager. The requirement of Executive Director is without any basis. There is no mandatory guideline regarding different designations to be given for operation of department.

24]. As per the enquiry report, it was the responsibility of the operator i.e. Pawan Hans Helicopters Ltd. to ensure the landing of Helicopters at licensed aerodrome. According to the respondent Nos. 4 and 5, Rule 78 of Aircraft Rules pertains to schedule transport services. Tawang helipad belongs to Arunachal Pradesh Government and maintained by them since 2008. The helipad is also manned by personnel of Government of Arunachal Pradesh and the responsibility regarding windsock, fire tender or ambulance rest with the Government of Arunachal Pradesh.

25]. As against the observation of enquiry committee that the Pawan Hans Helicopters Ltd. was supposed to provide MI-172 helicopters which were not more than 5 years of age. It has been averred that no such agreement was made with the Government of Arunachal Pradesh. Further, the helicopters have, generally, life more than 25 years with

regular change in the dynamic components like engines as prescribed by specification of the manufacturers. The helicopter was airworthy as per standard laid down by the manufacturers as well as DGCA. The helicopter though was more than 10 years of age, it was fully airworthy to fly. It was fully maintained as per the manufacturer's standards and DGCA rules by qualified engineers and therefore, there was no instance of poor maintenance. Moreover, if the helicopters cannot fly over the age of 5 years, the State Government could, at any stage, stop the services by terminating or suspending the contract.

26]. They (Respondents) have also denied the assessment of the committee of enquiry that retorque check was done on 18.04.2011. According to them, the retorque check was done on 17.04.2011, after the first test flight as required as per maintenance manual of MI-172 helicopter. There was whole night available between test flight on 17.04.2011 and test flight on 18.04.2011 to carry out retorque check. As per the procedure, the duplicate inspection of control can be carried out by a pilot at out station, which needs to be certified by an A.M.E at first available opportunity. The duplicate inspection of controls, it is averred, was carried out at Itanagar by P.I.C. on 17.04.2011 and thereafter again on 18.04.2011 by A.M.E. at Guwahati.

27]. The enquiry report also says that no simulator training for MI-172 pilots had been conducted as a specified for a long time which has been denied by the respondent No. 4 & 5. According to the respondents, the pilot had undergone simulated training of MI-172 helicopter and since the pilot himself was flying the helicopter for a long period, there was no requirement of further simulator training for the pilot.

28]. The report also says that in the PHHL standard operating procedure for the MI-172 helicopter for Itanagar, an advisory is mentioned that sorties to be completed at Tawang helipad before 1400 hours to avoid variable and gusty winds to approach the record of helicopter VT-PHF indicates that on the previous day itself i.e. on 18.04.2011, the helicopter landed at 1555 hours from Guwahati, thereby ignoring the standard procedure instructions. It is the stand of the respondents that those recommendations are only advisory and not mandatory.

29]. The enquiry report further says that there is no system of keeping weighing machines at any of the helipads/launching basis. For the aforesaid reason, the actual load on the helicopter before or after the flight could not be ascertained. However, the findings of enquiry commission in this respect are denied by the respondent Nos. 4 and 5.

30]. It is also in the report that it was the duty of the PHHL to check availability of crash and firefighting equipment and crew at the landing basis but the PHHL failed to insist on the availability of such resources.

31]. The cockpit voice recorder conversation records the pilot expressing a desire to sleep for an hour. The other pilot agreed with him and said that they should have lunch and go to sleep. The time was around 2 p.m. However, cockpit voice recorder did not give any indication that the pilot were not in full sense. With respect to make information at para 1.7 of the report says that no met briefing was obtained by the pilot on the day of accident. It is averred on behalf of the respondents that no adverse weather was reported by the met office because the accident was not reported to any bad weather. Weather condition was not a cause of accident. There is no civil meteorological office at Tawang. Army has

limited local met facilities; therefore, any met briefing register records at Tawang for civil operations could not be available.

32]. The report further suggests that the co-pilot at time and again cautioned the pilot to gain high and the pilot deliberately neglected the cautions. Before flying, met briefing is necessary. It is also in the report that the production of smoke could have been reduced if the engine had being switched off. In this accident, the engine was not switched off either by the captain or by the flight engineer. There is a master battery switch located close to flight engineer and within reach of the captain which could have been put off. If this had been put off, it would have immediately switched off all power supply in the helicopter.

33]. The report also says that there was no navigational aid installed at Tawang Helipad and Helicopter making non-instrumental approach while coming for landing when the accident occurred (1.8 of the Commission of Inquiry Report).

34]. Admittedly the Helipad at Tawang does not have fire fight service. Helipad is manned by two personnel who are not trained on crash and rescue services. There was no crash rescue equipment available at the Helipad. There is no fire tender or ambush available at the Helipad. There is no dispute that 19 passengers were killed due to inadequate fire fight equipment and non availability of crash/rescue facilities and persons trained in their use.

35]. Rules for the licensing of aerodromes contained in Air Craft Rules, 1937 requires that no airodrum shall be used as a regular place for landing and departure for the scheduled air transport service or for a series of landing and departures by any air craft carrying passenger or cargo for hire or reward unless it has been licensed whereas not even one Helipad is licensed or authorized in Arunachal Pradesh. The DGCA does not have kind of manpower required to

inspect all the Helipads in India or even just in Arunachal Pradesh alone. In Clause 3.2.1 of the Commission of Inquiry Report the direct cause of accident has been described as under:-

> "***3.2 Causes of Accident.***
>
> ***3.2.1 Direct Causes***
>
> ***The accident was caused because the helicopter undershot the helipad by about 27 meters and sunk below the height of the helipad by about a meter. The forward movement and the slow rate of descent caused the left oleo leg to shear off. This gave a slight left bank to the helicopter. Around this time the collective was increased to 13.8^0 in order to increase the rotor thrust. The slight bank and the increase in the rotor thrust increased the angular momentum of the helicopter to such an extent that the bank increased from 5^0 to 85^0 in a second. The rotor hit the beginning of the helipad causing the rotors to break. There being a steep slope adjacent to the helipad, the helicopter slid on this slope and almost turned over on its back after the accident. Subsequently, it caught fire and was totally destroyed.***
>
> ***3.2.2 Contributory Factors to the Accident.***
>
> ***Inadequate use of Met resources had contributed to the accident. Aircrew had disregarded the local QNH and temperature given by Tawang Control.***
>
> ***The AUW was above the stipulated limit given in the Flight Manual for Category 'A' operations."***

36]. Due to non-availability of proper firefighting equipment, the Helicopter continued to burn. Due to non-

availability of crash fire equipment, the passengers could not be evacuated in time which ended the life of 19 passengers.

37]. In clause 2.2.5 and 6 of the report it has been observed that the Gear Box, Engine and Hydraulic oils had leaked out in the near inverted position and fallen on the hot engine cowling. The oil immediately vaporized and very quickly enveloped the Helicopter. It was acrid, hot and suffocating. The production of smoke could have been reduced if the engine had been switched off, it would have cooled rapidly and the production of smoke reduced drastically. In this accident, the engine was not switched off. In the accident, the engine was not switched off, either by the Captain or by the Flight Engineer. There is a Master Battery Switch located close to the Flight Engineer and within the reach of the Captain which could have been put off. If this had been put off, it would have immediately switched off all power supply to the helicopter. The booster pump located in the main fuel tank would have been switched of and this would have resulted in fuel starvation to the engine, especially the inverted position. A switched off battery would also have prevented sparking at different places and the consequent fire.

38]. Thus the enquiry report furnished by the committee of enquiry, Ministry of Civil Aviation, Government of India clearly emphasizes on negligence as cause of air crash. According to the respondents, the crash dynamics cannot be predicted or designed. It may be an error of judgment due to many contributory factor and could not have been deliberate.

39]. It is apparent from the enquiry report as well as from the affidavits-in-opposition filed by the State respondents that specific safety concerned were brought to the notice of the respondent Nos. 4 and 5 and it is the breach

of specific safety norms that led to drastic incident. In clause 1.6.14 of the enquiry report it is stated that the size of helipad/ Lever area required for MI-172 as per flight manual is described. For Tawang it is stated that the available distance at Tawang Helipad does not meet the requirement of a rejected take-off. The rejected take-off distance varies with the elevation of the helipad and temperature. For Tawang at an elevation of 2500 m, for a temperature of 16^0 (c) (at the time of accident) rejected take off distance for a AUW of 10.2 tons is 270 m. But the entire table top area inclusive of the helipad would be less than 100m. Thus the available distance at Tawang helipad does not meet the requirement. The case of air primary has become regular incident in the air space of India in general and Arunachal Pradesh in particular. What is alarming is the blatant disregard for the written rules by the air carriers, air port operators and the regulators.

40]. There is not denial of the principle that if the writ petition involves disputed question on fact and judgment of such dispute requires making of enquiry report and Article 226 would originally be available to the person who claims to be agreed. However, in this writ petitions the respondents, particularly the respondent Nos. 4 and 5 have admitted that if the engine could have switched of probably smoke could have reduced although the respondent Nos. 4 and 5 have asserted that Pawan Hans Helicopter Ltd., or the pilots had not done anything with intent to cause damage or with knowledge that damage would probably result. It is admitted position that respondent Nos. 4 and 5 knowingly operated the aerodromes without proper fire fight facilities. They therefore, violated the rules of India Air Craft Rules. Furthermore, many flights safety regulations had given unchecked and unreported. It is apparent that Arunachal

Pradesh Aviation department is not adequately cleared the helipad safety norms.

41]. In the case of ***Smti. Kalawati and Others Vs. State of Himachal Pradesh and Another AIR 1989 H.P. 5*** and also in the case of ***Kumari Seema @ Seems Vs. Himachal Pradesh State Electricity Board and Others AIR 1994 H.P. 139***. The High Court ruled that the writ petition claiming damages for the injuries arising out of the accident occurred due to negligence of State authorities like Electricity Board is maintainable. In the case of ***Smti. Kumari Vs. State of Tamil Nadu and Others AIR 1992 SC 2069.*** The Apex Court overruled the decision of High Court of Tamil Nadu and observed that the writ jurisdiction under Article 226 of the Constitution of India can be invoked by the writ Court for awarding compensation to a victim who suffered due to negligence of the State or its functionaries.

42]. In view of above, and relying on the case of Sube Singh (Supra) this Court is of that since the accident occurred due to negligence of the respondent and for lack of proper care and operating the Helicopter in Arunachal Pradesh the writ petition under Article 226 of the Constitution of India is maintainable. The legal heirs & successors of deceased passengers are entitled to get compensation under Rule 25 of Carriage and Air Act, 1972 more than the limit prescribed under Rule 22(1) of the said Act. The Respondents are jointly and severally liable to pay the compensation.

43]. Having said that so far as the entitlement of the petitioners and the quantum of compensation are concerned, in WP(C) 223 (AP) 2012, the petitioner No.2 is representing the mother of Late Wrishi Bothra and the age of the mother of deceased has not been disclosed in the writ petition. The income of the aforesaid deceased has been stated as

Rs.36,30788/- per annum in the writ petition whereas in the written arguments, it is averred that Late Wrishi Bothra has drawn an annual package of Rs.43,76,052/- per annum for the year 2011-12. It is also appears from the writ petition as well as from the written arguments that Late Wrishi Bothra and his wife namely Late Nidhi Bothra, both of whom died in the tragic accident are survived by two minor sons, one 4(four) years old and another 8(eight) months old. There is no averment in the writ petition that mother of Late Wrishi Bothra, is legal guardian of the aforesaid minor sons or the minors sons are in her custody.

44]. Petitioner No.1, in WP(C) 223(AP) 2012, is the father of Late Amit Sarawgi and Krishna Sarawgi, the age of petitioner No.1 is not disclosed in the writ petition. As regard the income of Late Amit Sarawgi, it has been averred in the writ petition that his gross total income was Rs.10,99,484/- for the accounting year 2010-11. No document has been annexed in the writ petition in support of income of Late Amit Sarawgi. It is also stated that Late Amit Sarawgi is survived by a 2(two) years old son but whether the petitioner No.1 has been appointed as guardian of the minor son of the deceased Late Amit Sarawgi or the minor son in his custody has not been disclosed. The petitioners in Writ Petition have not claimed compensation representing the minor sons of the deceased.

45]. In WP(C) 107 (AP) 2013, the petitioner No. 1 is the widow of the deceased Late Dr. Nawang Toden, the petitioner Nos. 2 and 3 are the minor sons, petitioner Nos. 4 and 5 are the parents and petitioner No.6 is the younger brother of the deceased. The age of the parents of the deceased has not been disclosed. There is no averment that younger brother of the deceased was dependent on the deceased. It is stated that the deceased was drawing monthly salary of

Rs.53,759/- as on the date of death on the accident and he was 36 years of age. No supporting documents have been annexed as regard the age and income of the deceased.

46]. In view of the aforesaid facts and circumstances, this Writ Court cannot decide, who are the actual legal heirs or successors of the deceased persons and the quantum of compensation, the legal heirs and successors of the deceased persons are entitled. Therefore, the petitioners may approach the appropriate forum only to decide their entitlement to receive compensation as well as the quantum of compensation, they may be entitled to get.

47]. Both the Writ Petitions are accordingly disposed of in above terms.

JUDGE

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